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UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF CALIFORNIA

RICHARD A. HADSELL,
Plaintiff,

vs.

CACH, LLC and MANDARICH
LAW GROUP, LLP,
Defendants.

CASE NO. 3:12-CV-0235-L -RBB

**MEMORANDUM OF POINTS
AND AUTHORITIES**

INTRODUCTION

Pursuant to Federal Rule of Civil Procedure 56 Defendants, CACH, LLC
("CACH") and Mandarin Law Group, LLC ("MLG"), hereby submit their
Memorandum of Points and Authorities in support of their Motion for Summary
Judgment:

STANDARD

Summary judgment is appropriate when the “pleadings, depositions, answers to interrogatories, and admissions on file, together with the affidavits, if any, show that there is no genuine issue as to any material fact and that the moving party is entitled to judgment as a matter of law.” Fed. R. Civ. P. 56(c). “The burden on the party moving for summary judgment depends on who bears the burden at trial.” *Owings v. Hunt & Henriques*, 2010 U.S. Dist. LEXIS 91819 (S.D. Cal. 2010). Where “the moving party has the burden of proof at trial, that party must carry its initial burden at summary judgment by presenting evidence affirmatively showing, for all essential elements of its case, that no reasonably jury could find for the non-moving party.” *Fara Estates Homewoners Ass’n v. Fara Estates, Ltd.*, 134 F.3d 377, 378 (9th Cir. 1997). Where, as here, the moving party would not bear the burden at trial, then it can meet its burden on summary judgment by pointing to the absence of evidence with respect to any one element of the claim. *Owens*, 2010 U.S. Dist. LEXIS 91819 at *3.

ARGUMENT

I. DEFENDANTS’ REQUEST FOR 10% INTEREST IN THE PRAYER FOR RELIEF OF THE STATE COURT COMPLAINT DOES NOT CONSTITUTE A VIOLATION OF §1692(e) or (f).

Defendants’ request in the state court complaint’s prayer for relief for 10% interest on the claim does not constitute an attempt to collect an unauthorized amount in violation of §1692(f). If the state court finds that an account stated

1 exists between CACH and Plaintiff, CACH is entitled by California law to request
2 10% interest from the date of the breach. *See*, Cal. Civ. Code. §3289(b) (“If a
3 contract entered into after January 1, 1986, does not stipulate a legal rate of
4 interest, the obligation shall bear interest at a rate of 10 percent per annum after a
5 breach.”).

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8 In Count II of the state court complaint, CACH brought an account stated
9 claim, in the alternative to its breach of contract claim in Count I. *See* SMF ¶18.
10 An account stated is “a writing which exhibits the state of account between parties
11 and the balance owing from one to the other, and when it is assented to . . .
12 becomes a new contract.” *Gardner v. Watson*, 170 Cal. 570, 574 (1915). As an
13 account stated claim is a contract—particularly, a contract that does not stipulate a
14 rate of interest—CACH may charge the rate provided in Cal. Civ. Code §3289(b).
15 Thus, Defendants are not attempting to collect an amount unauthorized by law in
16 violation of §1692(f)(1).
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20 In analyzing this issue, the opinion in *Smyth v. Merchs. Credit Corp.* is
21 instructive. In *Smyth*, plaintiff argued that a prayer for relief which included an
22 estimated \$20.00 *ex parte* fee before it was mandated by statute violated the FCPA.
23 *See Smyth v. Merchs. Credit Corp.*, 2012 U.S. Dist. LEXIS 85524, *2 (W.D.
24 Wash. June 19, 2012). The Court explained that while the fee was not mandatory,
25 the Court had the ability to assess costs pursuant to statute. *Id.* at *7-8.
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1 Accordingly, because the court could assess the costs, the inclusion of the request
2 in the prayer for relief did not constitute an attempt to collect an unauthorized
3 amount in violation of §1692(f). *Id.* The Court added that, regardless, the request
4 was not material and thus, not actionable under §1692(e) or (f). *Id.* at *9. A
5 statement is material if it frustrates the Plaintiff's ability to intelligently choose
6 actions concerning his debt. *See Donohue v. Quick Collect, Inc.*, 592 F.3d 1027,
7 1034 (9th Cir. 2010). In *Smyth*, "the request [for the estimated costs did] not
8 concern the actual debt at all; rather it [was] a request directed to the court for
9 possible costs upon judgment as well as notice to the Plaintiff of potentially
10 statutory costs. Furthermore, this potential cost [did] not alter the avenues of debt
11 action already available to her." *Id.* at *9; *see also Winn v. Unifund CCR Partners*,
12 2007 U.S. Dist. LEXIS 24939 (D. Ariz. Mar. 30, 2007) (explaining that a request
13 in a prayer for relief is just that, a request).

14 Here, Defendants included a request for 10% interest in the prayer for relief.
15 *See SMF ¶19.* Like in *Smyth*, the Court is able to assess 10% interest from the date
16 of the breach pursuant to statute—Cal. Civ. Code. §3289(b). Similarly to *Smyth*,
17 this request was included in a prayer for relief, which is a request to the Court and
18 serves as notice to Plaintiff of a potential cost. Accordingly, as in *Smyth*, the
19 statement is not actionable under §1692(e) or (f).

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**II. THERE IS NO EVIDENCE MLG RECEIVED A CEASE AND DESIST
LETTER FROM PLAINTIFF.**

1 Plaintiff's claim under § 1692(c)(b) suffers from a fatal flaw in that there is
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3 no evidence in the record that MLG received a cease and desist letter from
4 Plaintiff. Section 1692(c)(b) states, in relevant part, that

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6 "[i]f a consumer notifies a debt collector in writing that the consumer refuses
7 to pay a debt or that the consumer wishes the debt collector to cease further
8 communication with the consumer, the debt collector shall not communicate
9 further with the consumer with respect to such debt. . .[i]f such notice from
the consumer is made by mail, notification shall be complete upon receipt."

10 Thus, in order to survive summary judgment, Plaintiff must present more than his
11 own self-serving testimony that he sent a cease and desist letter. *Nichols v. GC*
12 *Servs., LP*, 423 Fed. Appx. 744, 745 (9th Cir. Ariz. 2011). He must provide
13 evidence that MLG actually received his correspondence. *Id.* Plaintiff cannot do
14 so in this case.
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17 While it is true evidence that a letter was properly directed and mailed
18 creates a rebuttable presumption of delivery, Plaintiff has failed to provide
19 evidence that his correspondence was properly directed and mailed. *Id.* (citing
20 *Busquets-Ivars v. Ashcroft*, 333 F.3d 1008, 1009 (9th Cir. 2003)). Plaintiff testified
21 that he sent correspondence to MLG "[t]hrough the United States Postal Service"
22 that stated "[s]omething to the effect of, 'Stop contacting me. Stop writing me
23 letters. Stop phone-calling me. Stop putting me on the computer-generated caller
24 list and leaving messages on my phone. And that I do not owe this debt.'" See
25 SMF ¶9. However, he could not identify, even approximately, when he sent the
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1 correspondence. *Id.* at ¶10. He further could not identify the address to which the
2 correspondence was addressed. *Id.* at ¶11. Lastly, he admitted that he had no
3 indication from MLG that it ever received the correspondence. *Id.* at ¶12.
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5 Moreover, even if Plaintiff could provide evidence that his correspondence
6 was properly addressed and mailed, MLG easily overcomes the presumption of
7 receipt. MLG keeps detailed records of correspondence received from debtors and
8 has implemented a standardized system, known as “Eagle,” to document and
9 maintain that correspondence. *See* SMF ¶14. The custom and practice of MLG is
10 that any correspondence received from debtors, regardless of delivery, is
11 documented in MLG’s system. *Id.* at ¶15. A copy of the correspondence is
12 scanned or imaged into the system so that it may be kept as a part of the debtor’s
13 file. *Id.* MLG searched its system as it relates to Plaintiff and there was no
14 documentation of evidence of any correspondence from Plaintiff to MLG. *Id.* at
15 ¶16. Likewise, CACH reviewed its records and could find no indication that
16 correspondence was received from Plaintiff. *See* SMF ¶17. In short, there is no
17 evidence in the record to support an inference that MLG received the
18 correspondence allegedly sent by Plaintiff. As actual receipt is a prerequisite to a
19 violation of §1692(c)(b), there is no question of material fact that judgment should
20 be entered in favor of Defendant on this claim.
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1 Lastly, even if there was enough evidence to support an inference that MLG
2 had received Plaintiff's cease and desist, Plaintiff can provide no evidence that
3 Defendant communicated with Plaintiff after receipt. Plaintiff testified that he
4 could not affirmatively state when he communicated via telephone with MLG. *See*
5 SMF ¶13. His only idea as to the time frame was "[p]ossibly 2010." *Id.* Even if
6 that were the case, any claims based upon these communications would be outside
7 FDCPA's one-year statute of limitations.
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10 The FDCPA provides that "[a]n action to enforce any liability created by
11 this subchapter may be brought in any appropriate United States district court
12 without regard to the amount in controversy, or in any other court of competent
13 jurisdiction, within one year from the date on which the violation occurs." 15
14 U.S.C. §1692k(d). The "limitations period begins to run when the plaintiff knows
15 or has reason to know of the injury which is the basis of the action." *Mangum v.*
16 *Action Collection Serv., Inc.*, 575 F.3d 935, 941 (9th Cir. Idaho 2009). Here,
17 Plaintiff's only evidence as to the dates on which telephone conversations occurred
18 with MLG is his estimate that they occurred "[p]ossibly [in] 2010." Even taking
19 this vague inference as true, the statute of limitations would have run on this claim
20 in 2011, as Plaintiff was aware of his injury at the time of the communication.
21 Plaintiff did not file the instant action until 2012. *See* Original Complaint filed
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1/30/2012. Accordingly, any claim for wrongful communications in 2010 would be barred by the FDCPA's limitations period.

III. PLAINTIFF'S "ACCOUNT STATED ACTIVITY" ALLEGATIONS DO NOT CONSTITUTE A VIOLATION OF THE FDCPA.

Plaintiff's only remaining claim is that MLG violated the FDCPA in bringing a claim for account stated, in the alternative, to its breach of contract action against Plaintiff. Plaintiff alleges that in bringing the state court action, "Defendants factual (sic) alleged that Plaintiff had previously entered into a new, written contract with Mandarich Law Group, LLP, or one of its predecessors in interest." *See* Second Amended Complaint ¶29. Plaintiff further concludes that this statement was "false, deceptive, and misleading, because none of the parties to this purported account stated ever assented to a new, written contract between them." *Id.* at ¶30. There is no evidence, however, that Defendants actually made any such statement. In reality, looking at the plain language of the state court complaint, that statement never appears.

The account stated claim is composed of three elements: (1) previous transactions between the parties establishing the relationship of debtor and creditor; (2) an agreement between the parties, express or implied, on the amount due from the debtor to the creditor; and (3) a promise by the debtor, express or implied, to pay the amount due." *Zinn v. Fred R. Bright Co.*, 271 Cal. App. 2d 597, 600 (1969). "When a statement is rendered to a debtor and no reply is made

1 in a reasonable time, the law implies an agreement that the account is correct as
 2 rendered.” *Maggio Inc. v. Neal*, 196 Cal. App. 3d 745, 753 (1987).

3 Plaintiff’s theory is simple. An account stated claim is a “new, written
 4 contract.” See Second Amended Complaint ¶ 29. Plaintiff never assented to a
 5 “new, written contract” and as a result, Defendants made a misstatement by
 6 bringing an account stated claim. This theory, however, is based on a fundamental
 7 misunderstanding of the account stated cause of action and has been repeatedly
 8 rejected by federal district courts in California. See e.g., *Hashimi v. CACH*, 2012
 9 U.S. Dist. LEXIS 118988 (S.D. Cal., Oct. 31, 2012) (dismissing substantially
 10 identical state court complaint with prejudice which alleged creditor’s institution of
 11 account stated claim violated FDCPA); *Culp v. CACH, LLC*, 2012 U.S. Dist.
 12 LEXIS 147633 (S.D. Cal., Sept. 20, 2012) (dismissing FDCPA claim on
 13 substantially identical account stated state court complaint); *Odish v. CACH, LLC*,
 14 2012 U.S. Dist. LEXIS 157114 (S.D. Cal., Nov. 1, 2012)(same); *Jackson v. CACH,*
 15 *LLC*, 2012 U.S. Dist. LEXIS 157130 (S.D. Cal., October 31, 2012)(same);
 16 *Benedict v. CACH, LLC*, 2012 U.S. Dist. LEXIS 157130 (S.D. Cal., Nov. 1. 2012)
 17 (same); *Shubin v. Midland Credit Mgmt., Inc.*, 2008 U.S. Dist. LEXIS 123810 *5
 18 (C.D. Cal. 2008) (granting summary judgment in favor of defendant on FDCPA
 19 claim based upon complaint seeking to recover unpaid credit card debt asserting
 20 account stated claim); *Greenberg v. Hunt & Henriques*, 2011 U.S. Dist. LEXIS

1 116992, *9 n.2 (C.D. Cal. 2011) (noting that the Court’s independent research did
2 not find any support for the proposition that common counts cannot form the basis
3 of a lawsuit to recover an unpaid credit card account); *Heathman v. Portfolio*
4 *Recovery Assocs.*, 2013 U.S. Dist. LEXIS 27057 (S.D. Cal. 2013) (institution of
5 account stated and assumpsit claims in state court complaint did not constitute
6 FDCPA violation even though claim could not be proven and consumer did not
7 even owe debt).

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10 In essence, Plaintiff makes the same argument recently rejected in
11 *Heathman*. In *Heathman*, Plaintiff argued that the institution of an account stated
12 claim was a violation of the FDCPA because it was destined to fail on the merits.
13 *Heathman v. Portfolio Recovery Assocs.*, 2013 U.S. Dist. LEXIS 27057 at *9-10.
14 The Court rejected this argument outright because merely filing a cause of action
15 does not give rise to FDCPA liability. *Id.* at *10; *see also Mansfield v. Midland*
16 *Funding, LLC*, 2011 U.S. Dist. LEXIS 34102 (S.D. Cal. 2011) (“[A] debt collector
17 may file a debt collection action even if the debt collector does not at the time of
18 filing have adequate proof to support the claim.”). Such an argument is directly
19 inconsistent with the purposes of the FDCPA, as a non-frivolous lawsuit is one of
20 the fairest means of collecting a debt. *See Medialdea v. Law Office of Evan L*
21 *Loeffler PLLC*, 2008 U.S. Dist. LEXIS 109013 (W.D. Wash., June 19, 2008). Yet,
22 Plaintiff continues to argue that Defendants violated the FDCPA because the
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1 account stated claim will fail in state court. It should be noted, for the record, that
2 there is no evidence in this case that Defendants' account stated claim will be
3 unsuccessful. Moreover, the state court case is not set to go to trial for many
4 months. Accordingly, as in *Heathman*, Defendants' motion for summary judgment
5 must be granted.
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8 WHEREFORE, Defendants respectfully request that this Court enter
9 summary judgment in Defendants' favor, and for any other such relief this Court
10 deems appropriate.
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12 DATED: March 12, 2013

MANDARICH LAW GROUP, LLP
CACH, LLC

14 By: /s/Nicole M. Strickler
15 Nicole M. Strickler
16 Attorney for Defendants
17 CACH, LLC and
Mandarich Law Group, LLP
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